

October 23, 2003

Ms. Marlene H. Dortch
Commission's Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: I/M/O Annual Assessment of the Status of Competition in the
Market for the Delivery of Video Programming, Notice of Inquiry
MB Docket No. 03-172, FCC 03-185

Dear Secretary Dortch:

The New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") submits the following comments in response to the above captioned Notice of Inquiry ("NOI"). Specifically, we address the request for comments on mechanisms for ascertaining the extent of "effective competition", and the statutory 15% household penetration threshold for direct broadcast satellite ("DBS").¹ The Ratepayer Advocate respectfully submits that the current methodology for decisions on effective competition suffers from significant frailties that undermine the process for establishing the existence of effective competition, as explained further below and in the attachments to these comments. Therefore, the Ratepayer Advocate urges the Federal Communications Commission ("FCC" or "Commission") and/or the Media Bureau to initiate a rulemaking

¹ NOI, at ¶ 6.

that examines the current process and seeks suggestions to enhance the process for appropriate determinations of effective competition including imposition of a reasonably contemporaneous filing standard.

A determination of effective competition can currently be made by the Commission based on substantive proof that supports one of four tests set forth in 47 C.F.R. 76.905(b). Among these, the “competing provider test” permits a cable operator to demonstrate through competent evidence that the franchise area for which the determination of effective competition is sought is a) served by at least two unaffiliated multichannel video programming distributors (“MVPDs”) each of which offer comparable programming to at least 50% of the households in the franchise area, and b) the number of households that subscribe to DBS programming exceeds 15% of the franchise households. Invariably, cable operators submit their petitions for a determination of effective competition on the basis of a) DBS ads circulated in the franchise area, b) data from SkyTrends that measures DBS subscribership in the designated area(s), and c) Census household figures. In most cases, especially where there is no opposition to the petition filed by either the local franchise authority or other interested party, the Commission routinely grants the petition based on the cable operator’s assertion that 50% of the franchise area households have DBS advertised to them and that 15% of the reported Census households actually purchase DBS.

The issue that arises is whether the data submitted to the Commission is adequate to permit the conclusion that the franchise area under consideration is subject to effective competition on the date the petition is filed. The issue is magnified by the fact that the SkyTrends data time period measured, the Census data, and the date of the petition are

not contemporaneous to each other. In fact, the two sets of data and the petition represent three separate periods of time. The Commission, faced with this factual disparity in the petition, however, does not require updated information that provides a contemporaneous basis for decision. The Ratepayer Advocate has urged the Commission in three New Jersey cases, still pending, that the FCC should deny the petitions based on such mismatched data, and instead require cable operators to submit petitions on the basis of contemporaneous data.² The attachments to these comments serve to demonstrate that when contemporaneous household and DBS subscribership data is examined there is significant change in the ratios that affect disposition of the effective competition petition. In fact, use of contemporaneous data results in some systems not satisfying the 15% threshold.³

² See attached comments of the Ratepayer Advocate in opposition to the petitions in the following matters: *I/M/O Petition of Cablevision of Raritan Valley, Inc. for a determination of Effective Competition in Aberdeen, Bound Brook, green Brook, Old Bridge, Raritan, South Bound brook, Sayreville, and Warren*, CSR 5847-E; *I/M/O Petition of Cablevision of New Jersey – Bergen, for a Determination of Effective Competition in Closter, Cresskill, Old Tappan, River Vale, Rockleigh, Saddle River, Woodcliff Lakes, and Cablevision of Oakland fro a Determination of Effective Competition in Bogota, Franklin Lakes, Garfield, Rochelle Park, South Hackensack, Upper Saddle River, Kinnelon, Haledon, North Caldwell, Prospect Park, West Paterson, Wood-Ridge, and Cablevision of Newark for a Determination of Effective Competition in South Orange*, CSR 6169-E; *I/M/O Petition of Cablevision of Monmouth for a Determination of Effective Competition in Avon-by-the-Sea, Brielle, Colts Neck, Englishtown, Freehold, Howell, Interlaken, Manalapan, Manasquan, Marlboro, Millstone, Neptune, Ocean, Sea Girt, Spring Lake, Upper Freehold, Wall, Jackson, and CSC-TKR, Inc. d/b/a Cablevision of Hamilton for a Determination of Effective Competition in Washington, and Cablevision of Raritan Valley, Inc. for a Determination of Effective Competition in Manville, and Union Beach*, CSR 6176-E.

³ See also, *Petition for Reconsideration – Village of Key Biscayne, Florida*, CSR 5879-E, DA 03-2839 (September 4, 2003). The Village of Key Biscayne sought review of the Commission's grant of effective competition to Adelphia Cable Communications on substantive grounds leading to the Commission's vacatur of the Order as to Key Biscayne on Adelphia's motion. The Village presented factual information that contradicted the basis of the grant of effective competition. First, the Village effectively demonstrated that the majority of the Village population resided in condominium units with balconies facing north although a southern exposure was necessary to obtain DBS service; second, there was a great disparity between the number of households according to the 2000 Census, the number of cable television subscribers, and the number of DBS subscribers reported by SkyTrends that adversely affected Adelphia's ability to have substantiated satisfaction of the 15% threshold. Adelphia's motion to vacate the grant of effective competition as to Key Biscayne speaks to the acknowledged weakness of its proofs when examined with greater scrutiny and with reasonably contemporaneous data.

The Ratepayer Advocate believes that petitions for effective competition must be supported by reasonably contemporaneous Census data updated to within 3 months of the filing and satellite penetration data that is current, i.e., within 3 months of the filing. The use of unadjusted 2000 Census data with current 2003 satellite penetration data results in a serious data mismatch which undermines and distorts the competitive provider test used to assess whether effective competition exists. In our opinion, a cable operator should not be able to satisfy its burden under the competitive provider test by relying upon mismatched data from different periods. In the three pending New Jersey cases before the FCC, the Ratepayer Advocate demonstrated that use of mismatched data could result in a finding of effective competition when reasonably contemporaneous data otherwise shows that the 15% threshold is not met. Consistent with the cable operator's burden of proof, the Ratepayer Advocate believes that the FCC should impose upon cable operators that file effective competition petitions, a requirement that cable operators must support such petitions with updated 2000 Census data to reflect the number of households to a period within 3 months of the filing and use satellite penetration data within the same 3 month period of the filing (a "contemporaneous data filing requirement"). If a cable operator files a petition based upon non-updated 2000 Census data, the petition should be dismissed with direction to refile in compliance with the "contemporaneous data-filing requirement." In our opinion, such a requirement is fully consistent with the statutory presumption that effective competition does not exist unless the cable operator overcomes that presumption with reasonably contemporaneous data.

Accordingly, the Ratepayer Advocate recommends that the Commission initiate a rulemaking that examines the current process and seeks suggestions to enhance the

process for appropriate determinations of effective competition including imposition of a reasonably contemporaneous filing standard.

Respectfully submitted,

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